No. 84, Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITES STATES OF AMERICA, *Plaintiff*,

v.

STATE OF ALASKA

ON REPORT OF THE SPECIAL MASTER

BRIEF OF THE STATES OF ALABAMA, ARIZONA, CALIFORNIA, DELAWARE, HAWAII, IDAHO, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, UTAH, VERMONT, VIRGINIA AND THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF THE STATE OF ALASKA

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UNITED STATES OF AMERICA, *Plaintiff*,

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

For over 200 years, the Equal Footing doctrine expressed in the Northwest Ordinance of 1787 and acknowledged as a constitutional rule by this Court has been a linchpin of our federal system. Inherent in the exceptions of the United States taken to the Special Master's Report is a crabbed and narrow construction of that doctrine that would restrict it to "inland waters" and characterize the historic balancing of state and federal interests in the Submerged Lands Act, ch. 65, 67 Stat. 29 (codified at 43 U.S.C. §§ 1301 *et seq.*), as merely another federal grant, subject to the same rules of construction as one to any private individual or corporation.[1] Furthermore,

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1. The federal position, expressed in the Exceptions to the Special Master's Report, was more baldly asserted in 1984 by a then-Deputy Solicitor General: "[f]rom the federal perspective, it is perfectly obvious that the beds of navigable waters, inshore and offshore—traditionally the arteries of interstate and foreign commerce impressed with a federal navigational servitude—belong, if to anyone, to the nation rather than the individual states," but that "alas, our Supreme Court went astray in the 1840s" when it established the rule of state ownership. L.F. Claiborne, *Federal-State*

the United States urges a broad and unwarranted construction of this Court's standards governing states' interests in their inland waters contending, in effect, that the mere creation of a reserve shows the "public exigency" needed to withhold state waters, and an incomplete withdrawal defeats the states' constitutional interests.

Historic principles of federalism are not to be dealt with so lightly. The states represented in this brief are not mere federal grantees. They have a stewardship interest in the thousands of miles of coastline and inland waters that this Court has characterized as an inherent attribute of their sovereignty.

We note that another case pending before the Court presents related issues and an overlapping issue. That case, *Idaho v. Coeur d'Alene Tribe of Idaho*, No. 94-1474, presents the question whether the Tribe can maintain an action against the State, notwithstanding the bar of the Eleventh Amendment and the strong presumption of State ownership, to adjudicate its claim to the bed of the navigable Lake Coeur d'Alene. It is also raises an issue presented here, that is, whether a pre-statehood executive reservation, not specifically authorized by Congress,

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Offshore Boundary Disputes: The Federal Perspective, Law of the Sea Institute Eighteenth Annual Conference (1984), *reprinted in The Developing Order of the Oceans* 360 (R. Krueger and S. Riesenfeld, eds., 1985). Although Mr. Claiborne, a distinguished attorney awarded the sobriquet "The Celestial General," see L. Caplan, *The Tenth Justice* 155 (1987), disavowed any intention to represent the official position of the United States, he went on to say, "This is not to suggest that the government would have any cause to disagree with the very loyal and presumably correct statements made in this paper." L.F. Claiborne, *supra*, at 374 n.1. Indeed, the federal government's brief in *United States v. California*, 332 U.S. 19 (1946), stated that the rule applying the Equal Footing doctrine to support state ownership of tidelands and lands underlying navigable inland waters "is believed to be erroneous, but the government does not ask that it be overruled." Brief for the United States in Support of Motion for Judgment (No. 12, Original) (Oct. Term, 1946) (filed Jan. 1947) 22.

can defeat a future State's entitlement under the equal footing doctrine. Many of the States appearing as *amici* here appeared as *amici* in that case as well.

SUMMARY OF ARGUMENT

1. A clear and unequivocal intent of Congress based on international duty or public exigency must be shown before lands underlying navigable waters may be deemed to have been withheld from a state. Since the beginning of our Republic, the people of each state held "all their navigable waters, and the soils under them" for common use, as an attribute of sovereignty. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222-29 (1845).

2. Congress must show an affirmative intent to defeat a future state's title to such lands.

3. The executive branch alone may not act to defeat a state's interests in navigable waters. Congress must expressly and unequivocally take action, based on the criteria established in earlier decisions of this Court.

4. These principles are applicable whether the state's interest in the lands in question arises under the Equal Footing doctrine or under the Submerged Lands Act, because Congress intended in that Act to confirm the states' rights in their navigable waters and restore the status quo in that respect.

ARGUMENT

I.

THE STRONG PRESUMPTION AGAINST DIVESTITURE OF A STATE'S ENTITLEMENT TO ITS NAVIGABLE WATERS EXTENDS TO SUBMERGED LANDS AS WELL AS TO "INLAND NAVIGABLE WATERS"

A. The Equal Footing Doctrine Historically Has Applied To All Of A State's Navigable Waters.

In enunciating the Equal Footing doctrine, this Court has repeatedly characterized its significance in our federal system. The states' interests in navigable waters, acquired by the original colonies when "the people of each state became themselves sovereign," *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845) (citation omitted), and reserved to the newly admitted states as well, have been described as inherent attributes of sovereignty, "so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign . . . or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935).

For many years, it was assumed that submerged lands within the territorial sea, as well as tidelands and lands underlying navigable lakes and rivers, belonged to the states, as successors to the rights of the British crown. The common law made no distinction between the sovereign's interest in tidelands and those lands underlying the territorial sea. "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King." *Shively v. Bowlby*, 152

U.S. 1, 11 (1894) (citing Lord Chief Justice Hale in *De Jure Maris*). Thus, this Court concluded, "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea below ordinary high water mark, is in the King . . . ." *Id.* at 13.

As this Court stated in 1842, "[W]hen the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). The thirteen original states claimed ownership and control of the submerged lands under their coasts, as did those states subsequently admitted to the union. "It was substantially agreed that the 13 original Colonies owned the lands within three miles of their coasts because of their sovereignty and the alleged international custom . . . ." *United States v. Louisiana*, 363 U.S. 1, 22 (1960); *Pollard's Lessee*, 44 U.S. (3 How.) at 230. However, in *United States v. California*, 332 U.S. 19, 38-39 (1947), the Court accepted the arguments of the federal government that interests of national defense and international obligations compelled the holding that "paramount rights" in the submerged lands should rest in the United States.

More years of litigation over the meaning of "paramount rights" was forestalled by Congress's enactment of the Submerged Lands Act, which was expressly intended to reverse the Court's holding with respect to the submerged lands seaward of low tide out to their seaward boundaries. Nothing in the Act, its history, or this Court's subsequent interpretations of it suggest that in restoring the status quo with respect to the states' submerged lands, the presumption against frustration of those rights should be changed. Accordingly, the rules this Court has set forth in *Montana v. United States*, 450 U.S. 544

(1981) and *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987) remain in effect.

B. States' Lands Beneath Navigable Waters May Be Conveyed Or Reserved Only Under Limited Circumstances Not Demonstrated Here.

Under established principles, pre-statehood grants may be upheld only under "the most unusual circumstances," *Utah Div. of State Lands*, 482 U.S. at 197, and only "international duty or public exigency" has justified such actions. *Shively*, 152 U.S. at 48-50. Such conveyances are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Finally, such a conveyance must leave no doubt that it was intended to "embrace [] the land under the waters" affected. *Montana*, 450 U.S. at 552.

In the controversy before this Court, the record shows only an interest on the part of the executive to set aside large portions of public lands encompassing navigable waters for the purposes of a petroleum reserve and a wildlife refuge. No showing has been made that respect for equal footing rights and navigable waters within these areas is incompatible with the reservation. *Cf. Montana*, 450 U.S. at 556.

The presumption against such a pre-statehood grant or reservation may only be overcome by a showing that: 1) Congress clearly intended to include the submerged land within the reservation, and 2) Congress affirmatively intended to defeat the future state's title to the submerged lands. *Utah Div. of State Lands*, 482 U.S. at 202. Neither of those showings has been made here.

C. The Submerged Lands Act Restores States' Equal Footing Rights To Submerged Lands Within Their Boundaries.

As this Court has stated, "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*." *United States v. California*, 436 U.S. 32, 37 (1977). In examining the legislative history of the Act, this Court has noted that the 1953 Act was the culmination of many years of attempts to pass such legislation. *Louisiana*, 363 U.S. at 6 n.4.[2] The relevant legislative history cited by this Court in the *Louisiana* case makes it abundantly clear the purpose of Congress was to undo the 1947 decision with respect to the three-mile belt. A representative passage, from a Report on S.J. Res. 13 states: "The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past--that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution."
S. Rep. No. 133, 83d Cong., 1st Sess., to accompany S.J. Res. 13 at 7-8 (Mar. 27, 1953), quoted in *Louisiana*, 363 U.S. at 19 n.17.

Any possible doubt on this question was removed by this Court's decision with respect to the Channel Islands off

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2. "The legislative history of all the bills considered prior to enactment of the Submerged Lands Act in 1953 is directly relevant to the latter Act, since the purposes and phraseology of such bills, and the objections raised against them were substantially similar. During the hearings on the final bills [S.J. Res. 13 (1953) became the Submerged Lands Act], all prior hearings on predecessor bills were expressly incorporated into the record . . . ." *Louisiana*, 363 U.S. at 17 n.16 (emphasis added).

California's Coast. There, as mentioned, the court held, "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*." *California*, 436 U.S. at 37. Thus, an attempted reservation of lands that would have been federally-owned under the Submerged Lands Act failed because the passage of the Submerged Lands Act wiped out the underlying federal claim.

If Congress intended to restore the states' interests in the three-mile belt to their pre-*California* position, as the history of the Submerged Lands Act abundantly shows, then the states are entitled to "sovereignty and jurisdiction" over these lands. *Pollard's Lessee*, 44 U.S. (3 How.) at 229. "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." *Id.* at 230.

II.

ONLY CONGRESS CAN DEFEAT THE STATES' PRESUMPTIVE RIGHT TO LANDS ACQUIRED UNDER THE EQUAL FOOTING DOCTRINE AND THE SUBMERGED LANDS ACT

The decisions of this Court respecting states' interests in their submerged lands reflect two principles: 1) The executive branch has no inherent authority to withhold submerged lands, 2) Congress cannot impliedly delegate to the executive power to defeat a future state's equal footing title to submerged lands. Or, as this Court has stated: "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1942).

In *Sioux Tribe*, this Court held that the executive had no general power to convey public lands during the territorial period. *Id.* at 331. What implied delegation of power the executive possessed existed with respect to public lands, not submerged lands constituting an inherent attribute of state sovereignty. *Oregon*, 295 U.S. at 14. Although the Court found that with respect to the public lands, "the long-continued practice, [and] the acquiescence of Congress" justified upholding limited executive reservations, *Sioux Tribe*, 316 U.S. at 326 (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 483 (1915)), such a delegation was never extended to navigable waters.

Furthermore, clear and specific intent on the part of Congress must be required to find that the United States authorized a pre-statehood reservation of submerged lands in light of principles of federalism. To hold otherwise would

permit the constitutional balance between states and the federal government to be changed unilaterally by executive action.

A fortiori, a mere application for withdrawal, not approved until after statehood, cannot have the effect of defeating a State's equal footing title. This unconsummated act of the executive branch cannot be sustained.

CONCLUSION

The principles here go far beyond the competing claims of Alaska and the federal government to certain submerged coastal lands. In a line of decisions beginning in 1842, this Court has properly held that the constitutionally conferred interests of states in the navigable waters within their boundaries and along their coastlines were an attribute of sovereignty, to be defeated only by the most unequivocal expressions of congressional intent. Congress confirmed their rights in the Submerged Lands Act, with the clear intent to restore state sovereign interests in the three-mile belt. Those rules should be reaffirmed here.

Respectfully submitted,

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